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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Docket No. 758

WESTINGHOUSE BROADCASTING COMPANY, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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February 20, 1963

INDEX

Table of Cases Cited

	PAGE
Automatic Heating and Cooling Company, P-H 1942 B. T. A. Mem. Dec. para. 42,561 (1942)	4
Bonwit Teller & Co. v. Commissioner, 53 F. 2d 381 (2d Cir. 1931), *cert. denied*, 284 U. S. 690 (1932)	2, 3, 4
Fisher Brown, 9 TCM 1054 (1950)	3
Cleveland Railway Company, 36 B. T. A. 208 (1937), *acq.*, 1937-2 Cum. Bull. 5	3
Commissioner v. Chicago National League Ball Club, 74 F. 2d 1010 (7th Cir. 1935)	2
Commissioner v. Pittsburgh Athletic Co., 72 F. 2d 883 (3d Cir. 1934)	2
East Kauai Water Co., Ltd., 11 T. C. 1014 (1948)	3
Flynn, Harrison & Conroy, Inc., 21 B. T. A. 285 (1930), *acq.*, X-1, Cum. Bull. 22 (1931)	4
Harris-Emery Co., 10 B. T. A. 297 (1928)	3
Harris-Emery Co., 37 B. T. A. 958 (1938)	3
Helvering v. Kansas City American Ass'n Baseball Co., 75 F. 2d 600 (8th Cir. 1935)	2, 4
Syracuse Washing Machine Corporation, 17 B. T. A. 11 (1929), *acq.*, IX-1 Cum. Bull. 53 (1930)	3
William Penn Hotel Co., 23 B. T. A. 566 (1931)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

WESTINGHOUSE BROADCASTING COMPANY, INC., *Petitioner*, v. COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 753

REPLY BRIEF FOR PETITIONER

I

Respondent states that the petitioner (Broadcasting) "does not assert error . . . in relation to the factual inquiry." Broadcasting has, however, asserted error as to the rule under which the factual inquiry was conducted. The decisions below are based on a rule of law that a business contract with a fixed term cannot be depreciated where there is uncertainty as to the number of renewals. The proper rule of law, contended for by Broadcasting, is that a business contract with a fixed term is to be depreciated over the the term in existence *at the end of the taxable year* if there is uncertainty as to renewal. It is only where it appears from the record that a renewal term or terms are reasonably certain to occur that such renewal terms are added to the depreciable life of the contract.

The leading case on the depreciation of business contracts (*Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (2d Cir. 1931)) is clear authority that the extent to which renewal terms of a business contract may be taken into account for depreciation purposes is a question of law rather than one of fact. Since the Board of Tax Appeals in the *Bonwit Teller* case had applied an erroneous rule of law in determining the effect of renewal terms, it was reversed by the Court of Appeals.

II

In an attempt to explain away the conflict between the decisions below and *Bonwit Teller & Co.* v. *Commissioner*, 53 F. 2d 381 (2d Cir. 1931), *Commissioner* v. *Pittsburgh Athletic Co.*, 72 F. 2d 883 (3d Cir. 1934), *Commissioner* v. *Chicago National League Ball Club*, 74 F. 2d 1010 (7th Cir. 1935), and *Helvering* v. *Kansas City American Ass'n Baseball Co.*, 75 F. 2d 600 (8th Cir. 1935), respondent suggests several inconsequential distinctions.

Respondent finds a distinction in the fact that in those cases amortization was allowed over the initial term of the contracts, whereas Broadcasting could not claim amortization over such period since it did not own the contract during its initial term. The question before the Courts in each case was not whether depreciation was allowable only over the initial term. The question determined was whether potential renewal terms which had not become effective *at the end of the taxable year in issue* were to be taken into account in computing depreciation where there was uncertainty as to whether renewal would occur. That question was anwered in the negative by the Circuit Courts in the *Bonwit Teller* and baseball player contract cases and in the affirmative by the courts below. Thus there is a clear con-

flict between the decisions below and the cases relied upon by Broadcasting.

That conflict is not weakened by the fact that the network affiliation agreement was *renewed on October 1, 1953*, for a two-year term ending January 1, 1956.* At the end of both 1953 and 1954, the years at issue, the contract thus had a term expiring on January 1, 1956. Broadcasting has not claimed a complete write-off in 1953 because of the long standing rule that where a contract has been renewed during the taxable year, depreciation must be computed over such renewal term whether or not the contract itself contains a provision for renewal.**

Respondent points out that renewal of the contracts in the above-cited cases involved an element of renegotiation of price. That is not a distinction from the network affiliation contract, which could have been renewed only by agreement of both NBC and Broadcasting with the consequent opportunity for renegotiation by either party of every one of the contractual provisions. Moreover, such renegotiation actually occurred (R. 69a, 73a). The case for disregarding renewal terms is even stronger here. Broadcasting was completely dependent on agreement of NBC whereas in *Bonwit Teller* and the baseball player contract cases the taxpayers had limited renewal rights regardless of any further agreement.

*The Court of Appeals (Pet. App. 6a) and respondent on brief (Resp. Br. 3) mistakenly state that the affiliation agreement was renewed on January 1, 1954. The agreement was renewed when NBC and Broadcasting did not give notice by October 1, 1953, of a desire not to renew as provided by paragraph 23 of the agreement (R. 13a, 35a-36a).

**_East Kauai Water Co., Ltd._, 11 T. C. 1014 (1948); _Harris-Emery Co._, 37 B. T. A. 958 (1938); _Cleveland Railway Company_, 36 B. T. A. 208 (1937), _acq._, 1937-2 Cum. Bull. 5; _William Penn Hotel Co._, 23 B. T. A. 566 (1931); _Syracuse Washing Machine Corporation_, 17 B. T. A. 11 (1929), _acq._, IX-1 Cum. Bull. 53 (1930); _Harris-Emery Co._, 10 B. T. A. 297 (1928); _Fisher Brown_, 9 TCM 1054 (1950).

Respondent also mistakenly suggests that the decisions in the *Bonwit Teller* and *Kansas City* cases depended on the alleged fact that the amounts paid for the contracts bore a direct relation to the initial term of the contract. In the *Bonwit Teller* case the court stated:

> ". . . the result should be the same irrespective of whether the option of renewal entered into the estimated value of the lease." (53 F. 2d at p. 383.)

In the *Kansas City* case the court stated:

> "Obviously, the options add to the value of the the contracts; but it cannot be said that they extend the life of the contracts beyond one year, because of the uncertainty of their renewal." (75 F. 2d at p. 604.)

Thus the decisions in those cases did not depend upon the relation of the purchase price or value of the contract to the initial term of the contract.

III

The decision of the Tax Court in *Flynn, Harrison & Conroy, Inc.*, 21 B. T. A. 285 (1930), which was acquiesced in by the Commissioner of Internal Revenue (X-1 Cum. Bull. 22 (1931)), is directly contrary to the decision below. The facts were virtually identical and it was held as a matter of law that the potential renewal term should not be taken into account in computing depreciation in the year in which the contract was purchased. See also *Automatic Heating and Cooling Company*, P-H 1942 B. T. A. Mem. Dec. para. 42,561 (1942). The decisions below are thus contrary to the adminstrative practice at least since 1931. Indeed, each of the many cases in which amortization of the cost of a contract *over its term* has been allowed

is inconsistent in principle with the decisions below because in no such case was there any proof as to the likelihood that the contract would not be renewed.

Conclusion

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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